



November 30, 2010

Chairman Julius Genachowski  
Federal Communications Commission  
445 12th Street S.W.  
Washington, DC 20554

**Re: *Notice of Ex Parte Presentation*: GN Docket No. 09-191 (Preserving the Open Internet); WC Docket No. 07-52 (Broadband Industry Practices); MB Docket No. 10-56 (Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees); MB Docket No. 10-91 (Video Device Competition); CS Docket No. 97-80 (Commercial Availability of Navigation Devices); PP Docket No. 00-67 (Compatibility Between Cable Systems and Consumer Electronics Equipment)**

Dear Chairman Genachowski:

We write you today to express concern with recent actions taken by Comcast Corp. that run counter to long-standing FCC and congressional policies promoting competition in the customer premises equipment (CPE) market. Based on a complaint filed on November 29, 2010, by Zoom Telephonics,<sup>1</sup> Comcast currently violates not only the Commission's rules implementing Section 629 of the Communications Act,<sup>2</sup> but also the third principle of the *Internet Policy Statement*, which affirms consumers' right "to connect their choice of legal devices that do not harm the network."<sup>3</sup> By these actions, Comcast has committed two separate and inexcusable breaches. First, it has violated the Commission's Net Neutrality policies yet again. Second, it has willfully reneged on its own commitment to abide by those policies, even as it seeks regulatory approval to consummate one of the largest media mergers in history.<sup>4</sup> This pattern of deception and anticonsumer behavior, which has taken place even while the agency conducts its merger review, raises serious questions as to the company's ability to abide by either binding or nonbinding commitments placed on the NBC Universal transaction.

We call on the Commission to immediately investigate and resolve this matter. Furthermore, the Commission must take Comcast's anticompetitive behavior into account in its review of the pending merger, and should determine that Comcast's long history of consumer harm and the unique risks this transaction poses require the merger be denied. Should the Commission nevertheless approve the merger and incur these risks, strong and loophole-free conditions must be imposed to help forestall the worst harms. Finally, the Commission must move immediately to adopt final rules to implement enforceable pro-consumer safeguards for the open Internet, to prevent Comcast and other companies from denying users their choice of devices, content and applications online.

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<sup>1</sup> Complaint of Zoom Telephonics, Inc., against Comcast Cable Communications, LLC, a Subsidiary of Comcast Corporation (Nov. 29, 2010) (Zoom Complaint).

<sup>2</sup> See 47 C.F.R. §§ 76.1200-76.1210 (implementing section 629 of the Communications Act); 47 U.S.C. § 549.

<sup>3</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Policy Statement, 20 FCC Red 14986 (2005) (*Internet Policy Statement*).

<sup>4</sup> See Comcast Opposition to Petitions to Deny and Response to Comments, MB Dkt. 10-56 (filed July 21, 2010) ("Comcast is and will remain committed to the principles of the Internet Policy Statement, regardless of whether the FCC adopts any of the rules or reclassifications it is currently considering in its other proceedings, or reclassifies broadband Internet services."); see also David Cohen, "Comcast, the FCC, and 'Open Internet' Rules: Where We Stand," Comcast Blog (Jan. 11, 2010) ("In 2005, the FCC had adopted a very short, four-point 'Internet Policy Statement' that, among other things, described what consumers should be able to expect from their Internet service provider, including 'reasonable network management....When that Statement was issued, Comcast made it clear that we supported the four principles. We served (and still serve) our customers consistent with those principles.'").

**By impeding competition in the cable modem market, Comcast creates substantial consumer harm in the form of reduced choice and higher prices.**

Comcast's anticompetitive behavior imposes short-term restrictions on consumer choice and significantly increases consumer prices for broadband service. Comcast leases and sells cable modems directly to consumers and charges substantial costs for these add-ons to its broadband service offerings. Last year, Comcast increased the monthly rental fee for its cable modems by 66 percent, from \$3 to \$5; Comcast's retail prices for modems are around \$100 or more.<sup>5</sup> In contrast, a Zoom cable modem costs between \$55 and \$74, depending on the modem's speed.<sup>6</sup> If a customer subscribes to Comcast for 12 to 16 months and rents a cable modem during that time, the customer pays the cable operator fees equal to the cost of a Zoom modem, but still does not own the device – subscribers who do not return their cable modem to Comcast at the conclusion of their service are still charged the retail price of the device (around \$100). Comcast therefore has powerful incentives to encourage subscribers to continue to lease or buy their modems directly from the company, and thus to discourage the emergence of competitors that could provide consumers with meaningful choice.

By requiring additional hurdles for competitive providers of cable modems as alleged by Zoom, above and beyond already thorough tests by CableLabs to identify whether the equipment could be harmful to cable networks, Comcast can prevent competitors from entering the market and offering lower prices for cable modems to consumers, either by rejecting competing devices once evaluated or by refusing even to accept outside devices for certification. Even if Comcast does not reject competing devices, the costs that Comcast can unilaterally impose on its competitors to partake of the company's unique certification processes can themselves deter competitors from entering the market. And the Commission should be particularly concerned that it is *Comcast* engaging in this behavior: The company's dominance of the MVPD market means its actions alone can make or break a third party's ability to viably offer competitive navigation devices. As a result, Comcast's obstruction of third-party cable modem offerings affects not just Comcast consumers – it limits choice and raises prices for all cable broadband consumers.

Such actions have real-world consequences that impact important national priorities. The National Broadband Plan found that the high monthly service fee was the largest adoption barrier for those households that do not yet subscribe to broadband.<sup>7</sup> These high fees are a direct consequence of a duopoly network access market whose structure and non-existent regulatory oversight result in large excess profits for ISPs whose prices are not disciplined by competitive market forces.<sup>8</sup> The natural monopoly features of the telecommunications service market make this sub-optimal competition a reality that regulators must proactively confront. By frustrating and preventing the availability of third-party navigation devices, Comcast is further increasing the total price of broadband access by leaving consumers no choice but to rent modems from the MSO at exorbitant rates. This practice results in higher total prices and lower adoption, frustrating efforts to achieve the congressional goals embodied in the Communications Act and the National Broadband Plan.

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<sup>5</sup> See, e.g., Todd Spangler, "Comcast Hiking Cable-Modem Fee to \$5 From \$3 Monthly Nationwide," *Multichannel News* (Sept. 15, 2009), available at [http://www.multichannel.com/article/353986-Updated\\_Comcast\\_Hiking\\_Cable\\_Modem\\_Fee\\_to\\_5\\_From\\_3\\_Monthly\\_Nationwide.php](http://www.multichannel.com/article/353986-Updated_Comcast_Hiking_Cable_Modem_Fee_to_5_From_3_Monthly_Nationwide.php).

<sup>6</sup> See Zoom Products, Cable Modems, Overview, at [http://www.zoomtel.com/products/cable\\_overview.html](http://www.zoomtel.com/products/cable_overview.html).

<sup>7</sup> Federal Communications Commission, *Connecting America: The National Broadband Plan*, Omnibus Broadband Initiative, March 16, 2010, at 168 ("National Broadband Plan").

<sup>8</sup> See, e.g., Comments of Free Press, In the Matter of a National Broadband Plan for Our Future, GN Docket No. 09-51, at 8 (June 8, 2009).

**By impeding the connection of third-party devices, Comcast has violated the Commission's *Internet Policy Statement*, again.**

In 2005, the Commission released the *Internet Policy Statement* to articulate policy goals related to preserving the open Internet, and stated that these goals would be incorporated into subsequent Commission activity. The third of four principles adopted in the statement reads, "To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to connect their choice of legal devices that do not harm the network."<sup>9</sup> Although often understood to indicate that consumers can use the laptops, smartphones or other comparable devices of their choice with their Internet access connections, a cable modem unambiguously constitutes a legal device that connects to a broadband Internet access network. Thus, restrictions imposed by Comcast that prevent consumers from connecting and using the cable modems of their choice, if such devices would not harm Comcast's network, represent a violation of the third principle of the *Internet Policy Statement*.

Comcast's behavior clearly and substantially restricts consumers from using their choice of non-harmful devices on Comcast's broadband Internet access service. Cable modems and other devices connecting to a cable network already must submit to testing procedures established by CableLabs in order to demonstrate that they will not harm the network.<sup>10</sup> To permit consumers to attach devices of their choice, this testing is sufficient and complete. The third principle of the *Internet Policy Statement* therefore must be interpreted to prohibit individual network operators from requiring additional and unnecessary certification hoops for competing devices. Comcast's procedures go far above and beyond "harm"-based tests, and consequently prohibit the connection and use of non-harmful devices that have not been approved under (or even would not pass) Comcast's unique tests.<sup>11</sup> Furthermore, Comcast willfully refuses to commence the certification process for numerous devices, insisting that it holds no legal obligation to allow devices onto its network.<sup>12</sup> These unnecessary restrictions harm consumer choice in violation of the third principle.

This is not Comcast's first red-handed violation of the *Internet Policy Statement*. In 2007, Free Press, Media Access Project and Public Knowledge filed a complaint with the Commission over Comcast's practice of secretly blocking the use of applications and services built on the BitTorrent networking protocol on its broadband Internet access service, including online video services such as Vuze that arguably compete with Comcast's cable television offerings.<sup>13</sup> In August 2008, the Commission issued an order sanctioning Comcast for its behavior and ordering the company to terminate its network management practices, adopt practices that did not block consumers from using the applications of their choice, and disclose technical details of both its current and its proposed new practices.<sup>14</sup> Although jurisdictional issues have derailed the order, no factual dispute remains regarding the substance of Comcast's activity; the company clearly violated the second principle of the *Internet Policy Statement* by blocking applications and services directly. Thus, the Zoom Complaint represents Comcast's second (known) distinct violation of the *Internet Policy Statement*. Both resulted in substantial harm to competition and to consumers.

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<sup>9</sup> *Internet Policy Statement*, *supra* note 3, at 3.

<sup>10</sup> See Zoom Complaint, *supra* note 1, at 12-13, paras. 41-46.

<sup>11</sup> *Id.* at 21-24, paras. 77-90 (detailing Comcast's unique testing methods).

<sup>12</sup> *Id.* at 4, para. 10.

<sup>13</sup> Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, File No. EB-08-IH-1518 (Nov. 1, 2007).

<sup>14</sup> *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices, Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* File No. EB-08-IH-1518, WC Docket No. 07-52, Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008).

**By breaking its own promises and engaging in repeated anti-consumer and anticompetitive behavior, Comcast demonstrates the harms of permitting its proposed merger with NBC Universal.**

In 2009, Comcast and GE announced plans to merge Comcast's cable delivery and content businesses with the media properties and owned and operated broadcast stations of NBC Universal. Given the size and scale of this merger, its unique mix of vertical and horizontal combinations and effects, and its importance for the nascent market of online video distribution in particular, many have called on the Department of Justice and the Federal Communications Commission to prohibit the merger.<sup>15</sup> Studies have shown that the merger will have a substantial harmful impact not just on competition, but on consumer wallets, creating billions of dollars of additional direct and indirect costs.<sup>16</sup>

Attempting to paper over these objections and achieve rapid approval of the proposed merger, Comcast has made several voluntary statements regarding its own "good behavior." In particular, it has repeatedly asserted that it has always supported the Commission's four principles, that it complies with the principles, and that it will comply with the principles regardless of the status of the Commission's proceedings on reclassification and preserving the open Internet.<sup>17</sup> Although its merger is pending, Comcast has already broken these promises by violating Principle 3 of the *Internet Policy Statement*.

Comcast has repeatedly demonstrated its willingness to violate its commitments and engage in exactly the sort of anticompetitive activity that this merger portends. It remains unapologetic in causing similar harm to consumers in the form of increased prices and decreased choice. The Commission must bear this example in mind when considering the proposed merger. In particular, such a pattern of behavior creates doubt as to whether Comcast will abide by any promises made to mitigate the negative effects of the merger. It raises the specter that the company will identify and exploit any loopholes in the conditions, or possibly defy them entirely. And it reinforces the position of numerous public interest organizations that the Commission should deny the merger outright.

Nonetheless, if the Commission approves the deal over these and other dangers, the Commission should establish clear and unavoidable requirements to attempt to prevent anticompetitive behavior. The Commission should require Comcast to permit to be attached to its network any cable modem device approved by CableLabs, or another recognized certification body as non-harmful. This condition, along with many others, is a necessary but not sufficient component of required Commission action to alleviate the worst of the anticompetitive and anti-consumer harms that will arise if this merger is permitted. The Commission must simultaneously act to establish permanent protections for consumer choice in the market for cable modem devices, through rulemaking proceedings.

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<sup>15</sup> E.g., John Eggerton, "Free Press' Push to Stop Comcast-NBCU Merger Swells Public Comments," *Broadcasting & Cable* (May 21, 2010); Press Release, Free Press, Opponents of Comcast-NBC Merger Speak Out in Congress (Nov. 16, 2010), available at <http://www.freepress.net/press-release/2010/11/16/opponents-comcast-nbc-merger-speak-out-congress> (referencing letter by Senator Bernie Sanders (I-Vt.) to the Federal Communications Commission requesting that the FCC deny the proposed merger). See generally Mark Cooper, Director of Research, Consumer Federation of America, and Corie Wright, Policy Counsel, Free Press, "Why the Comcast/NBC Merger Poses a Major Threat to Video Competition that Antitrust Authorities Cannot Ignore," White Paper (Dec. 3, 2009), available at [http://www.freepress.net/files/FP\\_CFA-Comcast-NBC-WhitePaper.pdf](http://www.freepress.net/files/FP_CFA-Comcast-NBC-WhitePaper.pdf).

<sup>16</sup> See, e.g., Cecilia Kang, "Competitors say Comcast, NBC merger could cost consumers \$2B," *Washington Post, Post Tech* (Nov. 8, 2010), available at [http://voices.washingtonpost.com/posttech/2010/11/competitors\\_say\\_comcast\\_nbc\\_me.html](http://voices.washingtonpost.com/posttech/2010/11/competitors_say_comcast_nbc_me.html).

<sup>17</sup> E.g. Cohen, *supra* note 4.

**By unnecessarily expanding its review processes for retail cable modems, Comcast deliberately violates federal law concerning the attachment of navigation devices.**

As the Commission recently highlighted in FCC Staff Working Paper #1, the agency has a rich history of using public policy to facilitate growth, innovation and competition in communications markets.<sup>18</sup> In particular, it has facilitated the growth of competitive access device markets by setting universal standards and removing artificial market barriers. The *Carterfone* ruling, development of the Part 68 rules and the *Computer Inquiries* unequivocally established consumers' right to use non-harmful access devices of their choosing and facilitated competition and innovation in these markets. Congress too recognized the importance of removing artificial bottlenecks to facilitate consumer choice in device markets: For example, it enacted Section 629 of the Communications Act to ensure the competitive availability of MVPD access devices<sup>19</sup> and codified the Commission's Part 64 CPE rules.<sup>20</sup>

Congress and the Commission designed these policies to enhance consumer welfare by preventing network operators from using their market power in the primary connections market to dominate the otherwise freely competitive CPE market. History shows that left unchecked, network operators have strong incentives to use their market position to extract excess rents from the CPE market, thereby reducing innovation and harming consumers.

In the current matter, Comcast has erected (or erects) artificial barriers to entry for third-party cable modem manufacturers like Zoom Telephonics through blatant abuse of the device certification process. As the *Zoom Complaint* notes, Comcast requires device manufacturers to adhere to standards that have *absolutely nothing* to do with "electronic or physical harm" to the network. Instead, Comcast adds unnecessary and unlawful layers to the process of compliance certification. As a substantive matter, it focuses on irrelevant and unreasonably restrictive aesthetic and durability concerns.<sup>21</sup> As a procedural matter, its unabashed misuse of the certification process to secure perks such as business-class trips and boondoggles in 5-star hotels under the guise of "factory tours" offends basic notions of fair business practice.<sup>22</sup> These practices unequivocally violate Section 629 and the Commission's rules, and their only purpose is to frustrate competition and consumer choice.

As a threshold matter, it is clear that the devices in question, cable modems, are covered under Section 629, and that the Commission has clear authority to intervene. Section 629 directs the Commission to "adopt regulations to assure the commercial availability [of] equipment used by consumers to access multichannel video *programming and other services offered over multichannel video programming systems*, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor."<sup>23</sup> The Commission's rules reflect this broad definition that includes any device used to access any services offered over MVPD systems.<sup>24</sup> The Commission has also explicitly clarified that this language does indeed cover cable modem devices. In the 1998 *Navigation Devices Order*, the Commission affirmed Section 629's applicability to cable

<sup>18</sup> Sherille Ismail, "Transformative Choices: A Review of 70 Years of FCC Decisions," FCC Staff Working Paper #1 (October 2010), available at [http://www.fcc.gov/Daily\\_Releases/Daily\\_Business/2010/db1117/DOC-302496A1.pdf](http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db1117/DOC-302496A1.pdf).

<sup>19</sup> 47 U.S.C. § 549(a).

<sup>20</sup> 47 U.S.C. § 549(d)(2).

<sup>21</sup> See *Zoom Complaint*, *supra* note 2, at 21-23, paras. 79-85.

<sup>22</sup> *Id.* at 24, para. 90.

<sup>23</sup> 47 U.S.C. § 549(a) (*emphasis added*).

<sup>24</sup> See 47 C.F.R. § 76.1200(c) (defining navigation device as "[d]evices such as converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multi-channel video programming systems").



modem devices, stating that “Section 629 is intended to result in the widest possible variety of navigation devices being commercially available to the consumer.”<sup>25</sup> In 2003, the Commission reaffirmed this, stating Section 629 also applies to any type of equipment used to access MVPD programming and services, including televisions, VCRs, cable set-top boxes, personal computers, program guide equipment and cable modems.”<sup>26</sup>

The Commission’s rules based on Section 629 establish a broad consumer device attachment right, restrained only by “reasonable and legitimate concerns of electronic or physical harm or theft of service.”<sup>27</sup> Though the Commission’s rules direct MVPDs to ensure device compliance through the “publishing and providing to subscribers standards and descriptions of devices that may not be used with or attached to its system,” in practice the Commission has ceded authority in this arena completely to Cable Television Laboratories, Inc. (“CableLabs”). While the reliance on CableLabs (an entity controlled by the top MVPDs that is not a standards-setting body) for device certification raises its own set of questions, companies like Comcast are insisting that devices must also go through an onerous and unnecessary series of testing at Comcast’s leisure, before they can be used on the company’s network. Simply put, there is no legitimate need for device manufacturers to have to go through Comcast’s second, duplicative round of testing, when CableLabs, of which Comcast is the largest member, already tests devices to ensure they conform to specifications that go above and beyond the non-harm standard.<sup>28</sup>

The current status of the set-top box market should illustrate to the Commission the dangers created when it fails to protect and promote competition in equipment markets. The Commission has an opportunity to preserve existing competition in the market for cable modems, and should immediately intervene to stop the cable industry’s efforts to circumvent the requirements of Section 629.

### **The Commission must take action now.**

The Commission should view with skepticism the promises of a company with a long history of secretly breaking them. The Commission must take action promptly to rein in Comcast’s bad behavior, to lower broadband prices, and to protect consumer choice. The Commission must also take Comcast’s anticompetitive behavior into consideration before approving a merger that would further increase Comcast’s incentives and capabilities to engage in anticompetitive behavior. Finally, the Commission must move in all haste to adopt final rules in its pending net neutrality rulemaking proceeding, to create a framework for the resolution of future violations by Comcast and others.

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<sup>25</sup> See *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Report and Order, 13 FCC Rcd 14775 (1998) (*Navigation Devices Order*). “Section 629 covers not just equipment used to receive video programming, but also equipment used to access ‘other services offered over multichannel video programming systems.’ Such equipment includes televisions, VCRs, cable set-top boxes, personal computers, program guide equipment, and cable modems” (*Navigation Devices Order* at para 8).

<sup>26</sup> See *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Second Report and Order, 18 FCC Rcd 20885 (2003) (*Second Navigation Devices Order*).

<sup>27</sup> See 47 C.F.R. § 76.1203 (“A multichannel video programming distributor may restrict the attachment or use of navigation devices with its system in those circumstances where electronic or physical harm would be caused by the attachment or operation of such devices or such devices that assist or are intended or designed to assist in the unauthorized receipt of service. Such restrictions may be accomplished by publishing and providing to subscribers standards and descriptions of devices that may not be used with or attached to its system. Such standards shall foreclose the attachment or use only of such devices as raise reasonable and legitimate concerns of electronic or physical harm or theft of service. In any situation where theft of service or harm occurs or is likely to occur, service may be discontinued.”).

<sup>28</sup> According to CableLabs, “[t]he objectives of the Certified Cable Modem Project include enabling the cable industry to rapidly develop and deploy innovative broadband technologies by establishing the necessary set of communications and operations support interface specifications for cable modems and associated equipment. The specifications are intended to be non-vendor specific, allowing cross-manufacturer compatibility and rapid time to market for manufacturers of high-speed data communications services over two-way hybrid-fiber/coax (HFC) cable television systems.” See <http://www.cablelabs.com/cablemodem/faqs/>



Respectfully,

/s/

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